

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

SALVADOR HERNANDEZ and YADIRA
 HERNANDEZ,

Plaintiffs,

v.

WELLS FARGO BANK, N.A., et al.,

Defendants.

3:12-cv-62-RCJ-WGC

ORDER

Currently before the Court are two Motions to Dismiss (#6, 18) and a Motion to Expunge Lis Pendens (#8). The Court heard oral argument on May 29, 2012.

BACKGROUND

I. Facts

Plaintiffs Salvador Hernandez and Yadira Hernandez (collectively "Plaintiffs") executed a note secured by a deed of trust on a piece of property located at 317 "K" Street, Sparks, Nevada, 89431, which was recorded in Washoe County on September 22, 2004. (Deed of Trust (#7) at 5, 7). The mortgage, dated September 20, 2004, was for \$209,900. (*Id.* at 6). The lender and beneficiary on the deed of trust was Wells Fargo Bank, N.A. (*Id.* at 5-6). The trustee on the deed of trust was United Title of Nevada. (*Id.* at 6).

On December 1, 2009, Plaintiffs defaulted on their mortgage payments. (See Notice of Default (#7) at 40).

On August 18, 2010, Wells Fargo Bank executed a substitution of trustee and replaced

1 MTC Financial as the trustee for United Title of Nevada.¹ (Substitution of Trustee (#7) at 44).

2 On August 20, 2010, LSI Title Agency and Ticor Title of Nevada as agent for MTC
3 Financial Inc. dba Trustee Corps, as agent for beneficiary, recorded a notice of default and
4 election to sell with the Washoe County Recorder's office. (Notice of Default (#7) at 40-41).
5 The notice of default named MTC Financial dba Trustee Corps as the duly appointed
6 substituted trustee. (*Id.* at 40). The notice of default identified the breach of obligations as
7 "the installment of principal and interest, along with late charges, plus foreclosure costs and
8 legal fees, plus all of the terms and conditions as per the deed of trust, promissory note and
9 related loan documents." (*Id.*).

10 On December 8, 2011, Trustee Corps recorded a notice of trustee's sale with the
11 Washoe County Recorder's office. (Notice of Trustee's Sale (#7) at 46-47). That same day,
12 Trustee Corps recorded a certificate from the Nevada foreclosure mediation program which
13 stated that the beneficiary could proceed with the foreclosure process. (Mediation Certificate
14 (#7) at 49). On January 23, 2012, Trustee Corps recorded a trustee's deed upon sale which
15 explained that Trustee Corps had sold the property to Federal Home Loan Mortgage
16 Corporation for \$133,363.67 at a public auction on January 19, 2012. (Trustee's Deed Upon
17 Sale (#7) at 51-52).

18 **II. Complaint**

19 In January 2012, Wells Fargo Bank, N.A. filed a petition for removal and attached
20 Plaintiffs' complaint from the Second Judicial District Court in Washoe County. (Pet. for
21 Removal (#1); Compl. (#1) at 6-16). In the complaint, Plaintiffs sued Wells Fargo Bank, N.A.,
22 United Title of Nevada, Inc., and MTC Financial, Inc. dba Trustee Corps, Inc. (collectively
23 "Defendants"). (Compl. (#1) at 6).

24 Plaintiff alleged three causes of action. (*Id.* at 12-15). In the first cause of action,
25 Plaintiffs alleged unlawful or fraudulent foreclosure because Defendants had improperly
26 invoked the non-judicial foreclosure procedures and recorded documents that did not qualify

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28 ¹ The Substitution of Trustee was recorded on December 16, 2010. (Substitution of Trustee (#7) at 44).

1 for recording under NRS § 111.205, the statute of frauds. (*Id.* at 12). In the second cause
2 of action, Plaintiffs sought declaratory relief that Defendants did not have the right to foreclose
3 based on the documents filed to date. (*Id.* at 13). Plaintiffs asserted that Defendants had
4 violated NRS § 111.205 and, thus, the documents that had been filed with the Washoe County
5 Recorder's office were void and unenforceable. (*Id.*). In the third cause of action, Plaintiffs
6 sought injunctive relief. (*Id.*).

7 DISCUSSION

8 I. Wells Fargo Bank's Motion to Dismiss (#6)

9 Wells Fargo asserts that its motion to dismiss should be granted because the
10 substitution of trustee was *executed* prior to the filing of the notice of default and that it does
11 not matter that the substitution of trustee was *recorded* after the filing of the notice of default.
12 (Mot. to Dismiss (#6) at 6). Wells Fargo argues that the recorded documents establish legal
13 authority to foreclose on Plaintiffs' property. (*Id.* at 8). Wells Fargo asserts that the first cause
14 of action should be dismissed because Plaintiffs failed to tender and, thus, cannot state a
15 claim for wrongful foreclosure. (*Id.* at 10). Wells Fargo argues that NRS § 111.205 is not
16 applicable to the current case. (*Id.* at 11). Wells Fargo asserts that the second and third
17 claims should be dismissed because declaratory relief and injunctive relief cannot survive
18 without a substantive claim. (*Id.* at 12-13).

19 Plaintiffs, counseled, did not file a response. (*See generally* Docket Sheet). Wells
20 Fargo filed a notice of non-opposition stating that Plaintiffs failed to respond by February 26,
21 2012. (Non-Opp'n (#15) at 2).

22 Local Rule 7-2(d) states that "[t]he failure of an opposing party to file points and
23 authorities in response to any motion shall constitute a consent to the granting of the motion."
24 Nev. Loc. R. 7-2(d). As such, Plaintiffs' failure to respond constitutes the granting of the
25 motion to dismiss. The Court grants Wells Fargo Bank's Motion to Dismiss (#6) the complaint
26 in its entirety without leave to amend.

27 II. Wells Fargo Bank's Motion to Expunge Lis Pendens (#8)

28 Wells Fargo filed a motion to expunge lis pendens because the complaint was entirely

1 devoid of any reason why the foreclosure of the property was unlawful. (Mot. to Expunge Lis
2 Pendens (#8) at 5).

3 Plaintiffs, counseled, did not file a response. (*See generally* Docket Sheet). Wells
4 Fargo filed a notice of non-opposition stating that Plaintiffs failed to respond by March 1, 2012.
5 (Non-Opp'n (#15) at 2).

6 Local Rule 7-2(d) states that "[t]he failure of an opposing party to file points and
7 authorities in response to any motion shall constitute a consent to the granting of the motion."
8 Nev. Loc. R. 7-2(d). As such, Plaintiffs' failure to respond constitutes the granting of the
9 motion to expunge lis pendens. The Court grants Wells Fargo's Motion to Expunge Lis
10 Pendens (#8).

11 **III. United Title of Nevada's Motion to Dismiss (#18)**

12 United Title filed a motion to dismiss the entire complaint. (Mot. to Dismiss (#18) 4-5).

13 Plaintiffs, counseled, did not file a response. (*See generally* Docket Sheet). United
14 Title filed a notice of non-opposition stating that Plaintiffs failed to respond by March 29, 2012.
15 (Non-Opp'n (#25) at 1).

16 Local Rule 7-2(d) states that "[t]he failure of an opposing party to file points and
17 authorities in response to any motion shall constitute a consent to the granting of the motion."
18 Nev. Loc. R. 7-2(d). As such, Plaintiffs' failure to respond constitutes the granting of the
19 motion to dismiss. The Court grants United Title of Nevada's Motion to Dismiss (#18) the
20 complaint in its entirety without leave to amend.

21 **IV. MTC Financial, Inc. dba Trustee Corps, Inc.**

22 Trustee Corps did not file a motion to dismiss in this case. However, the Court *sua*
23 *sponte* dismisses them from the case because they were a properly substituted trustee at the
24 time that they filed the notice of default. As such, the foreclosure was proper.

25 **CONCLUSION**

26 For the foregoing reasons, IT IS ORDERED that Wells Fargo's Motion to Dismiss (#6)
27 is GRANTED without leave to amend.

28 IT IS FURTHER ORDERED that Wells Fargo's Motion to Expunge Lis Pendens (#8)

1 is GRANTED.

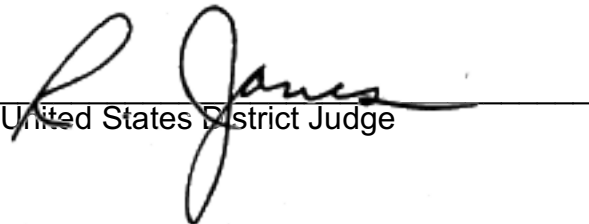
2 IT IS FURTHER ORDERED that United Title of Nevada's Motion to Dismiss (#18) is
3 GRANTED without leave to amend.

4 IT IS FURTHER ORDERED that MTC Financial Inc. dba Trustee Corps, Inc. is *sua*
5 *sponte* DISMISSED from this case.

6 IT IS FURTHER ORDERED that Wells Fargo's Request for Decision on its Motion to
7 Dismiss and Motion to Expunge Lis Pendens or in the Alternative Request for Hearing (#29)
8 is DENIED as moot.

9 The Clerk of the Court shall enter judgment accordingly.

10 DATED: This 6th day of July, 2012.

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14 United States District Judge
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